TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1957

No. [redacted] 19

MITSUGI NISHIKAWA, PETITIONER,

vs.

JOHN FOSTER DULLES, SECRETARY OF STATE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 13, 1956

CERTIORARI GRANTED NOVEMBER 13, 1956

No. 14742

United States
Court of Appeals
For the Ninth Circuit.

MITSUGI NISHIKAWA,

Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—10-21-55

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Los Angeles 12, Calif.

In the United States District Court, Southern District of California, Central Division

No. 14813-T

MITSUGI NISHIKAWA,

Plaintiff,

vs.

DEAN ACHESON, as Secretary of State,

Defendant.

COMPLAINT UNDER SECTION 503 UNITED STATES NATIONALITY ACT

Comes Now the plaintiff and complains of the defendant as follows:

I.

Plaintiff is a citizen of the United States. He was born in the United States, at Artesia, California, on April 20, 1916. He is at present a temporary resident of Tokyo, Japan.

II.

He claims Los Angeles, California, within this judicial district, as his permanent residence.

III.

The defendant is the Secretary of State of the Government of the United States. As such, he is the head of said State Department.

IV.

This Court has jurisdiction herein by virtue of

Title 8, [2*] United States Code, Section 903 (Section 503, United States Nationality Act).

V.

On or about August 15, 1939, plaintiff went to Japan for the purpose of further education and experience in the engineering field; his intention was to return to the United States.

VI.

On or about March 1, 1941, plaintiff was conscripted into the Japanese army and served in the Japanese army until August, 1945; his service in said army was due to the Japanese Conscription law, and was the result of coercion, and was not the plaintiff's free and voluntary act.

VII.

On or about December 1, 1947, the plaintiff applied for a passport as a citizen of the United States, in order to return to the United States, at the office of the United States Consul at Yokohama, Japan; said United States Consul refused to issue to the plaintiff a passport of the United States for the purpose aforesaid; and instead, on February 16, 1948, issued to plaintiff a Certificate of the Loss of the Nationality of the United States, on the ground that plaintiff had lost his United States citizenship by serving in the Japanese Army, which said certificate was approved by the Department of State on April 15, 1949.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

By this action, defendant has denied to the plaintiff a right and or privilege as a citizen of the United States.

At all times herein, said United States Consul was and is an officer and agent of the United States Department of State and in the denial aforesaid acted for and on behalf of the defendant, as Secretary of State of the United States.

Wherefore, plaintiff prays for a judgment and for a decree adjudging that he is a citizen and/or national of the United States, [3] and as such is entitled to the rights and/or privileges of a national of the United States, including a passport in order to return to the United States.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,
Attorneys for Plaintiff.

[Endorsed]: Filed December 5, 1952. [4]

[Title of District Court and Cause.]

ANSWER TO PLAINTIFF'S COMPLAINT

Comes now the defendant, John Foster Dulles, as Secretary of State, through his attorneys, Walter S. Binns, United States Attorney for the Southern District of California, Clyde C. Downing and Robert K. Grean, Assistants United States Attorney for the Southern District of California, and in answer to

plaintiff's complant herein admits, denies and alleges as follows:

I.

Referring to the first averment of Paragraph I of plaintiff's complaint, denies that plaintiff is a citizen of the United States.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in Paragraph I of said complaint and all of the allegations of Paragraph II of said complaint, and on that ground denies each and every other allegation therein contained.

II.

Admits the allegations contained in Paragraph III of plaintiff's complaint. [5]

III.

Defendant neither admits nor denies the allegations contained in Paragraph IV of plaintiff's complaint, on the ground that said allegations are conclusions of law.

IV.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph V of said Complaint and on that ground denies said allegations.

V.

Admits that the plaintiff entered and served in the Japanese Army from March 1, 1941, to August, 1945, but denies each and every other allegation con-

tained in Paragraph VI of plaintiff's complaint. Defendant alleges that plaintiff's entry and service in the Japanese Army was his free and voluntary act and not the result of coercion, and was at a time when plaintiff was a national of Japan.

VI.

Defendant has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph VII of said complaint, and on that ground denies each and every allegation therein contained, except that defendant admits that the United States Consul referred to therein was an officer and agent of the United States Department of State acting for and on behalf of the defendant as Secretary of State of the United States.

And for a Further, Separate and Second Defense, Defendant Alleges:

I.

Plaintiff's complaint fails to state a claim upon which relief can be granted.

Wherefore, defendant prays for a judgment dismissing said complaint, denying the relief prayed for therein, and for such other relief as to the Court seems just and proper in the premises. [6]

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division.

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed February 6, 1953. [7]

[Title of District Court and Cause.]

STIPULATION FOR SUBSTITUTION OF JOHN FOSTER DULLES, AS SECRETARY OF STATE, AS PARTY DEFENDANT

It is Hereby Stipulated, pursuant to the provisions of Rule 25(d), Federal Rules of Civil Procedure, that John Foster Dulles, as Secretary of State, be substituted as party defendant in the above-entitled case.

Dated: 29 January, 1953.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,
Attorneys for Plaintiff.

WALTER S. BINNS,
United States Attorney;

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division,

By /s/ ROBERT K. GREAN,
Assistant U. S. Attorney;
Attorneys for Defendant.

So Ordered: February 6, 1953.

/s/ WILLIAM M. BYRNE,
Judge, United States
District Court.

[Endorsed]: Filed February 6, 1953. [9]

[Title of District Court and Cause.]

MINUTES OF THE COURT—DEC. 23, 1954

Present: Hon. Wm. M. Byrne, District Judge.

Counsel for Plaintiff: Hugh R. Manes.

Counsel for Defendant: James R. Dooley, Ass't. U. S. Att'y.

Proceedings: For trial.

Plaintiff is called, sworn, and testifies in his own behalf.

Plaintiff's Ex. 1 (Certificate of loss of nationality) is marked for ident. and admitted in evidence.

Plaintiff's Ex. 2 (Military service law of Japan) is admitted in evidence.

Attorney Dooley argues oral motion to dismiss.

Court orders said motion denied.

Plaintiff's Ex. 3 is marked for ident. only, said exhibit being an application for passport.

Counsel argue.

Court makes a statement and Orders judgment for defendant; Attorney Dooley to prepare and submit findings and judgment. [10]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause having come on regularly for trial on December 23, 1954, before the Honorable Wm. M. Byrne, Judge Presiding without a jury, the plaintiff appearing by his attorneys, Wirin, Rissman & Okrand, by Hugh R. Manes, and the defendant appearing by his attorneys, Laughlin E. Waters, United States Attorney, and Max F. Deutz and James R. Dooley, Assistant United States Attorneys, by James R. Dooley, and evidence having been introduced on behalf of the plaintiff and the defendant, and the Court having considered the same, and having heard the arguments of counsel, and being fully advised in the premises, makes the following Findings of Fact and Conclusions of Law: [11]

Finidings of Fact

I.

Plaintiff, Mitsugi Nishikawa, was born in the United States at Artesia, California, on April 20, 1916. He claims Los Angeles, California, within the jurisdiction of this Court, as his permanent residence.

II.

The defendant, John Foster Dulles, is the Secretary of State of the Government of the United States, and as such, is the head of the State Department.

III.

During August, 1939, at a time when plaintiff was 23 years of age, he journeyed to Japan, knowing at that time that he was likely to be called for military service in the Japanese Armed Forces.

IV.

Plaintiff remained in Japan from August, 1939, until March 1, 1941, and on the latter date plaintiff was inducted and entered into the Japanese Army. He served in said Army from March 1, 1941, until September 16, 1945. Plaintiff's entry and service in the Japanese Army was at a time when he was a national of Japan.

V.

On or about June, 1940, approximately nine months prior to his entry into the Japanese Army, plaintiff was notified to take and did take a physical examination for entrance into the Japanese Armed Forces. Between the date of this physical examination and the date of plaintiff's entry into the Japanese Army, plaintiff made no effort to return to the United States, nor did plaintiff [12] make any effort to avoid entry or service in the Japanese Armed Forces.

VI.

Plaintiff did not, during the period between June, 1940, and March 1, 1941, or at any time, protest his induction into the Japanese Armed Forces. Plaintiff made no attempt during this period to renounce

his Japanese nationality, nor did he communicate, or attempt to communicate, with either American officials in Japan, or with Japanese officials, with respect to the necessity or propriety of his entry and service in the Japanese Armed Forces.

VII.

It is not true, as alleged in plaintiff's Complaint, that his service in the Japanese Army was the result of coercion and was not the plaintiff's free and voluntary act.

VIII.

It is true that plaintiff's entry and service in the Japanese Armed Forces was his free and voluntary act.

IX.

On or about December 1, 1947, plaintiff went to the American Consulate at Yokohama, Japan, and orally requested a passport to return to the United States. Plaintiff's request for a passport was not granted, but instead, on February 16, 1948, the American Vice Consul at Yokohama, Japan, executed a Certificate of the Loss of Nationality of the United States, which Certificate stated, among other things, that plaintiff had expatriated himself under the provisions of Section 401(e) of Chapter IV of the Nationality Act of 1940, by serving in the Japanese Army from March 1, 1941, to September 16, 1945, as a Japanese national. [13] Said Certificate was approved by the Department of State, Washington, D. C., on or about April 15, 1949, and

a copy thereof was thereafter furnished to plaintiff.

Conclusions of Law

I.

This Court has jurisdiction of the subject matter and parties to this action, pursuant to Section 503 of the Nationality Act of 1940.

II.

Plaintiff possessed both United States and Japanese Nationality at the time of his entry and service in the Japanese Army.

III.

Plaintiff has lost his United States nationality, pursuant to Section 401(c) of the Nationality Act of 1940, by reason of his voluntary entry and service in the Japanese Armed Forces while a national of Japan, and plaintiff is not now, and ever since said voluntary entry and service in the Japanese Armed Forces has not been, a citizen or national of the United States, and judgment should be entered accordingly.

Dated: This 17th day of January, 1955.

/s/ WM. M. BYRNE,
United States District Judge.

Affidavit of Service by Mail attached.

Lodged January 6, 1955.

[Endorsed]: Filed January 17, 1955. [14]

United States District Court, Southern District of California, Central Division

No. 14813-WB Civil

MITSUGI NISHIKAWA,

Plaintiff,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Defendant.

JUDGMENT

The above cause having come on regularly for trial on December 23, 1954, before the Honorable Wm. M. Byrne, Judge Presiding without a jury, the plaintiff appearing by his attorneys, Wirin, Rissman & Okrand, by Hugh R. Manes, and the defendant appearing by his attorneys, Laughlin E. Waters, United States Attorney, and Max F. Deutz and James R. Dooley, Assistant United States Attorneys, by James R. Dooley, and evidence having been introduced on behalf of the plaintiff and the defendant, and the Court having considered the same, and having heard the arguments of counsel, and being fully advised in the premises, and the Court having made its Findings of Fact and Conclusions of Law, and having ordered that judgment be entered in acordance therewith;

Now, Therefore, It Is Ordered Adjudged and Decreed as Follows: [16]

I.

That the plaintiff, Mitsugi Nishikawa, born at Artesia, California, on April 20, 1916, and having

acquired United States nationality at birth, lost his United States nationality by voluntarily entering and serving in the Armed Forces of Japan, from March 1, 1941, to September 16, 1945, while a national of Japan, and plaintiff is not now, nor has he been since said entry and service in the Japanese Armed Forces, a citizen or national of the United States.

II.

It is Further Ordered that plaintiff's prayer for a judgment and for a decree adjudging that he is a citizen and/or national of the United States be, and the same hereby is denied.

III.

It is Further Ordered that defendant shall have judgment and his costs. Costs taxed at $20.00.

Dated: This 17th day of January, 1955.

/s/ WM. M. BYRNE,
United States District Judge.

Lodged January 6, 1955.

[Endorsed]: Filed January 17, 1955.

Docketed and entered January 19, 1955. [17]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Mitsugi Nishikawa, plaintiff above named, hereby appeals to the United

States Court of Appeals for the Ninth Circuit from the judgment entered in this action on January 19, 1955.

Dated: This 16th day of March, 1955.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,

Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 17, 1955. [18]

In the United States District Court, Southern District of California, Central Division

No. 1483-WB Civil

MITSUGI NISHIKAWA,

Plaintiff,

vs.

JOHN FOSTER DULLES, Secretary of State,

Defendant.

Honorable William M. Byrne, Judge Presiding.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

December 23, 1954

Appearances:

For the Plaintiff:

WIRIN, RISSMAN & OKRAND, By HUGH R. MANES, ESQ.

For the Defendant:

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant United States Attorney,
Chief of Civil Division, and

JAMES R. DOOLEY,
Assistant United States Attorney.

Thursday, December 23, 1954—9:40 A.M.

The Court: Call the calendar.

The Clerk: Case No. 14813, Mitsugi Nisikawa vs. John Foster Dulles.

Mr. Manes: Ready for the plaintiff.

Mr. Dooley: Ready for the defendant.

Mr. Manes: Take the stand, please.

MITSUGI NISHIKAWA

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: State your name, please.

The Witness: Mitsugi Nishikawa.

Direct Examination

By Mr. Manes:

Q. Mr. Nishikawa, when and where were you born, please?

A. April 20, 1916, Artesia, California.

Q. You claim Los Angeles, California, as your permanent residence? A. Yes, sir.

(Testimony of Mitsugi Nishikawa.)

Q. When did you go to Japan?

A. On or about August 15, 1939.

Q. Prior to that time had you resided continually in the United States? [3*] A. Yes.

Q. And had you been educated in the schools of the United States? A. Yes, sir.

Q. Did you ever serve in the Japanese Army?

A. Yes, sir.

Q. When?

A. On or about the 1st of March, 1941, I was drafted in the Japanese Army.

Q. You were drafted? A. Yes, sir.

Q. What do you mean by being "drafted"?

A. I received a notification from the Japanese government to report for a physical examination. I don't remember the exact date. It was in 1940. And after that I received a notification to report for duty on March 1, 1941.

Q. And this second notice, this notice to report to duty, that was from the Japanese government?

A. Yes.

Q. And in accordance with that notice you reported for duty? A. Yes, sir.

Q. How long did you serve in the Japanese Army?

A. I served until the termination of the war. It was—— [4]

Q. 1945? A. '45.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

(Testimony of Mitsugi Nishikawa.)

Q. In August, 1945? A. Yes, sir.

Q. And did you go to the American Consulate after the war? A. Yes, sir.

Q. For what purpose?

A. To obtain a passport to America, United States.

Q. And do you recall when it was that you went to the Consulate?

A. It was about the 1st of December, 1947.

Q. What was the result of that application, Mr. Nishikawa?

A. About a year later——

Mr. Dooley: I object, your Honor, on the ground he hasn't mentioned any application as yet.

The Court: Assuming facts not in evidence?

Mr. Dooley: Yes, your Honor.

The Court: Sustained. Ask another question.

Q. (By Mr. Manes): At that time, Mr. Nishikawa, did you make application to return to the United States?

A. Yes. I made an affidavit. I asked for application but they gave me a paper on what—if I served in the army. I think—— [5]

Q. Well, you attempted to apply to make application, is that correct? A. Yes.

Mr. Dooley: I object to the leading question.

Q. (By Mr. Manes): What was the result of your efforts to return to the United States, Mr. Nishikawa?

A. About a year later I received a certificate of loss of citizenship from the American Consulate.

(Testimony of Mitsugi Nishikawa.)

Mr. Manes: May I have this document marked Exhibit 1 for identification?

The Court: Plaintiff's Exhibit 1 marked for identification.

(The document referred to was marked Plaintiff's Exhibit 1 for identification.)

Q. (By Mr. Manes): I show you a document which purports to be a "Certificate of the Loss of the Nationality of the United States," issued to one Mitsugi Nishikawa. Does this relate to you, Mr. Nishikawa? A. Yes, sir.

Q. Is the document which you received from the Consulate in Japan? A. Yes.

Mr. Manes: I offer it in evidence as Exhibit 1.

Mr. Dooley: No objection.

The Court: It may be received. [6]

(The document referred to, marked Plaintiff's Exhibit 1, was received in evidence.)

PLAINTIFF'S EXHIBIT No. 1

Certificate of the Loss of the Nationality of the United States

(This form has been prescribed by the Secretary of State pursuant to Section 501 of the Act of October 14, 1940, 54 Stat. 1171.)

Consulate of the United States of America,
Yokohama, Japan—ss.

I, Douglas W. Overton, hereby certify that, to the best of my knowledge and belief, Mitsugi

(Testimony of Mitsugi Nishikawa.)

Nishikawa was born at Artesia, California, on April 20, 1916.

That he resides at 175 Ojima, Ojima-machi, Nitta-gun, Gumma-ken, Japan.

That he last resided in the United States at Torrance, California.

That he left the United States on August 15, 1939.

That he acquired the nationality of the United States by virtue of birth in the United States.

That he has expatriated himself under the provisions of Section 401(e) of Chapter IV of the Nationality Act of 1940 by serving in the Japanese Army from March 1, 1941, to September 16, 1945, as a Japanese national, such nationality having been acquired at birth.

That the evidence of such action consists of the following: Applicant's affidavit dated December 1, 1947, on file at this office.

In testimony whereof, I have hereunto subscribed my name and affixed my office seal this 16th day of February, 1948.

[Seal] /s/ DOUGLAS W. OVERTON,
American Vice Consul.

Approved by the Department of State under Instruction dated 4/15/49.

Service No. 1264.

Admitted in evidence December 23, 1954.

(Testimony of Mitsugi Nishikawa.)

Mr. Manes: I understand that counsel will stipulate with me that this document is the "Military Service Law of Japan" at the time Mr. Nishikawa, the plaintiff, entered into the Japanese army.

Mr. Dooley: So stipulated.

Mr. Manes: I offer this into evidence as Exhibit No. 2 for the plaintiff.

The Court: It may be received.

The Clerk: Exhibit 2.

(The document referred to, marked Plaintiff's Exhibit 2, was received in evidence.

PLAINTIFF'S EXHIBIT No. 2

In the District Court of the United States, Southern District of California, Central Division

No. 1483-WB

MITSUGI NISHIKAWA,

Plaintiff,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Defendant.

STIPULATION

It Is Stipulated that the Constitution of Japan and the laws of Japan pertaining to service in the Japanese armed forces provide as follows:

The Constitution of Japan

Article 20:

A subject of Japan will obey the laws and have obligations of military service.

(Testimony of Mitsugi Nishikawa.)

The Military Service Law of Japan

Article 1:

Male subjects of the Empire shall serve in the military service as established in this law.

Article 23:

Any person who becomes 20 years old during the time between December 1st and November 30th of the following year, must take the physical examination for conscription, except those to whom special provision of this law is applied.

The age stipulated in the foregoing clause is called the conscription age.

Article 74:

Any person who evades military service by deserting or hiding, injuring wilfully one's body, or aquiring disease and by other acts of fraud, will be punished to penal servitude of 3 years or less.

Article 75:

Persons called for military service who delay entering the barracks for more than 10 days, without any legitimate reasons, shall be punished by imprisonment of 6 months or less; during wartime, when 5 days has elapsed, shall be punished by imprisonment of 1 year or less.

(Testimony of Mitsugi Nishikawa.)

Dated November 29, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTCH,
Chief, Civil Division,
Assistant U. S. Attorney.

WIRIN, RISSMAN & OKRAND.

Admitted in evidence December 23, 1954

Mr. Mangs: No further questions at this time, your Honor.

Mr. Dooley: Your Honor, at this time the defendant would like to make a motion to dismiss. The plaintiff has offered no evidence whatsoever of duress. The only evidence before this court is that he was conscripted in the Japanese army. It is submitted, your Honor, that conscription per se does not constitute duress.

The plaintiff has not testified that he was coerced, forced, that he feared anything; that anyone told him that if he didn't enter the army that he would suffer punishment, or any of the factors of that nature. He has merely stated that he was conscripted in the Japanese army. And on that [7] basis, your Honor, it is felt that plaintiff has not established a prima facie case. And for that reason defendant

(Testimony of Mitsugi Nishikawa.)

makes a motion to dismiss the cause of action.

The Court: Denied.

Cross-Examination

By Mr. Dooley:

Q. Mr. Nishikawa— A. Yes.

Q. —when you went to Japan in August, 1939, how old were you? A. 23 years old.

Q. And you knew at the time that you went to Japan, did you not, that Japan was at war in Manchuria?

Mr. Manes: I object to that as immaterial.

The Court: Overruled.

Q. (By Mr. Dooley): Will you answer the question, please?

A. I didn't think it was war.

Q. Did you know that Japan was fighting in Manchuria? A. Yes.

Q. And you knew, did you not, Mr. Nishikawa, that if you went to Japan you were likely to be drafted in the Japanese army; is that correct?

Mr. Manes: I will object to that on the ground, in the first place, it is immaterial; and in the second place calls for a conclusion; and in the third place it is vague and [8] indefinite.

The Court: Overruled.

The Witness: No, sir.

Q. (By Mr. Dooley): Now, did you make any effort to find out, Mr. Nishikawa, whether you would

(Testimony of Mitsugi Nishikawa.)

be drafted, likely to be drafted in the Japanese army when you went to Japan in 1939?

Mr. Manes: I will object to that again on the ground that it is immaterial. If your Honor please, I would like to make a continuous objection to all these questions because of the same ground.

The Court: The objection is overruled.

The Witness: No, sir.

Q. (By Mr. Dooley): Why did you go to Japan in 1939, Mr. Nishikawa?

A. I went for a visit and to study.

Q. How long did you intend to remain in Japan when you went?

A. Between two to five years.

Q. Between two to five years?

A. To finish my study.

Q. Now, you stated, did you not, Mr. Nishikawa, that in 1940 you received a notice to report for physical examination, is that correct?

A. Yes, sir. [9]

Q. What time in 1940 did you receive that notice?

A. I don't recall the exact date, sir.

Q. Do you recall the approximate date?

A. It was around June, 1940.

Q. June of 1940. And you entered the Japanese army in March of 1941, is that correct?

A. Yes, sir.

Q. Now, between June of 1940, and March of 1941, did you go to the American Consulate and tell

(Testimony of Mitsugi Nishikawa.)

them that you did not want to serve in the Japanese army?

Mr. Means: I will object to that question on the grounds it is immaterial and irrelevant.

The Court: Overruled.

The Witness: No, sir, because I talked to friends of mine and they mentioned the fact that the American Consulate couldn't do anything for dual citizenship of Japanese while in Japan.

Q. (By Mr. Dooley): Between June of 1940, and March of 1941, did you tell any Japanese official that you were an American citizen?

Mr. Manes: I object on the same ground; immaterial.

The Court: Overruled.

The Witness: No, sir.

Q. (By Mr. Dooley): Between June of 1940 and March of 1941, did you make any effort to renounce your Japanese [10] nationality?

Mr. Manes: I object again; irrelevant.

The Court: Overruled.

The Witness: No, sir.

Q. (By Mr. Dooley): Where were you living in Japan, Mr. Nishikawa?

A. I was living in Gumma prefecture.

Q. Near what city is that?

A. Ota, O-t-a City.

Q. Did you communicate with the United States while you were in Japan and before you entered the army?

(Testimony of Mitsugi Nishikawa.)

A. Yes, I wrote letters to my friends in America, United States.

Q. How often did those letters pass between you? A. About once a week, sir.

Q. Did those friends tell you what was going on in the United States?

Mr. Mames: I will object as immaterial.

Mr. Dooley: This is preliminary, your Honor.

The Court: Overruled.

The Witness: I just received news of friends and what they were doing. That's all.

Q. (By Mr. Dooley): You knew, did you not, that on September 16, 1940, the United States was drafting men in the United States Army? [11]

A. No, sir.

Q. Your friends did not tell you that, is that correct? A. Yes, sir.

Q. Did you have any Japanese friends in Japan who were also American citizens?

A. Yes, sir.

Q. Did you ever discuss with them conditions in the United States?

A. No, sir; just whenever we discussed anything it was on what our friends were doing in America. And we didn't have any knowledge of the condition in the United States.

Q. Now, you spoke English when you went to Japan in 1939, did you? A. Yes, sir.

Q. And you read English, did you not?

A. Yes, sir.

(Testimony of Mitsugi Nishikawa.)

Q. Did you read the newspapers between September 16th, 1940, and March of 1941?

A. No, sir.

Q. You didn't read any newspapers?

A. No, sir.

Q. Now, how far did you go in school before you went to Japan in 1939, Mr. Nishikawa?

A. I graduated from the University of California at Berkeley, sir. [12]

Q. And you took up engineering, did you not?

A. Yes, sir.

Q. You didn't read any newspapers between the time that you went to Japan in—pardon me—between September 16, 1940, and March of 1941, is that true?

Mr. Manes: I am going to object to the question on the ground it is unintelligible. It does not say what kind of newspaper: Japanese newspaper or American.

Q. (By Mr. Dooley): Did you read any Japanese newspaper?

A. Japanese newspaper? I couldn't read Japanese characters, so it was—I just didn't—gave up hope of trying to read newspapers.

Q. Did you read the Nippon Times?

A. We were situated out in the country and the Nippon Times wasn't delivered there.

Q. So you didn't do any reading of newspaper at all. Is that your testimony? A. Yes, sir.

Q. You had a father in the United States at that time, too, did you not? A. Yes, sir.

(Testimony of Mitsugi Nishikawa.)

Q. And a mother, too? A. Yes, sir.

Q. Is that correct? A. Yes. [13]

Q. Did you communicate with them?

A. Yes, sir.

Q. How often did you communicate with them?

A. About once in two weeks, sir.

Q. And they didn't tell you about the draft in the United States, either; is that right?

A. No, sir.

Q. Now, when you received your notice to report to the Japanese Army did you protest in any way your entrance in the Japanese army?

Mr. Manes: I object to that as immaterial and irrelevant.

The Court: Overruled.

The Witness: No, I didn't.

Q. (By Mr. Dooley): Now, after you entered the Japanese army, Mr. Nishikawa, to what unit were you assigned?

Mr. Manes: I object to that as immaterial.

The Court: Overruled.

The Witness: I was assigned to the training unit in Niwatsuki for about three or four months. And later I transferred to 60th Air Force Regiment in China, and I served with this regiment the rest—until the termination of the war.

Q. (By Mr. Dooley): Is that also known as the 2378th Bomber Regiment?

A. Yes, sir. [14]

Q. Now, you were first stationed in China, you say? A. Yes, sir.

(Testimony of Mitsugi Nishikawa.)

Q. How long did you remain in China?

Mr. Manes: I am going to object to that question and all other questions pertaining to the service as immaterial on the ground

The Court: Overruled. Oh, excuse me.

Mr. Manes: I wanted to explain.

The Court: The ground is immateriality?

Mr. Manes: Yes, sir. I wanted to explain my reason for the immateriality. And that is to say, once a man is conscripted it matters little what he has done. The army says what he can do once he is in the army. It is a form of coercion, and therefore these questions are immaterial as to whether he entered voluntarily.

The Court: All of his activities in connection with the service are material on the question of whether or not his action was voluntary. Now, insofar as the conscription is concerned, that in itself is not necessarily dispositive of the question of whether or not his action was voluntary. As I have indicated before in these cases the mere fact that he is conscripted, that in and of itself is not necessarily dispositive of the question of whether or not it was voluntary, whether his acts were voluntary.

Now, of course the issue is whether or not his acts, at the time he went into the service and served in the service, [15] whether his acts were voluntary. The only question insofar as those things that occurred subsequent to the time he went into the service, some of those things may and some of them may not be of any probative value to the court in

(Testimony of Mitsugi Nishikawa.)

determining what his state of mind was at the time he went into the service.

As an illustration, I might say that the person who is conscripted in the service and then six months later he is a general and running the Air Corps, let us say, certainly that would be evidence that not only was his service in the army voluntary, not under duress and coercion, but also that his entrance into the service was voluntary.

Mr. Manes: Thank you, your Honor.

Q. (By Mr. Dooley): Now, Mr. Nishikawa, you were first stationed in China, is that correct?

A. Yes, sir.

Q. How long did you remain in China?

A. About six months, sir. It was, I think, in November, that we were shipped out to French Indo-China.

Q. And then how long did you remain in French Indo China?

A. It was in French Indo-China that war broke out with the United States. And after the fall of Singapore we went through Singapore to the Philippines.

Q. When did you get to the Philippines, Mr. Nishikawa? [16]

A. It was in February, about February, 1942.

Q. How long did you remain there?

A. Until the fall of Corregidor. And then we went to Manchuria for our winter training.

Q. Now, what were your duties with this bomber regiment, Mr. Nishikawa?

(Testimony of Mitsugi Nishikawa.)

A. It was mechanic or maintenance man, I think. What we did was—what I did was cleaning up the fuselage; and as far as mechanics is concerned, changing spark plugs and cleaning the inner. That was about the most technical work I did.

Q. And that was a job of some responsibility, was it not?

A. No, sir. There was no responsibility on my concern.

Q. You had quite a bit of engineering training while at the university? A. Yes, sir.

Q. And you used that training on the planes, is that correct? A. No, sir.

Q. Now, this bomber regiment was a part of the Japanese air force, was it not?

A. Yes, sir.

Q. Is it not true, Mr. Nishikawa, that members of the Japanese air force volunteered for the service? [17]

A. No, sir. The noncoms did, but enlisted men were all draftees.

Q. Now, what other duties did you do besides keep the planes in condition?

Mr. Manes: I will object to the question. And I would like to have a standing objection to this line so I won't have to interrupt.

The Court: Objection overruled.

Mr. Manes: May there be a standing objection?

The Court: Make your objection and I will rule on it.

The Witness: K. P. duty, sir.

(Testimony of Mitsugi Nishikawa.)

Q. (By Mr. Dooley): That was on week ends, is that right?

A. No, sir. It came on—the first year or so we had K. P. duty on most every other day, sir.

Q. Now, you were in the Philippines, were you not, at the time of the march from Corregidor?

Mr. Manes: I object as being immaterial and irrelevant.

The Court: Overruled.

The Witness: What was if? March——

Q. (By Mr. Dooley): March from Corregidor?

A. Yes, sir.

Q. And you saw American soldiers there at that time? A. No, sir.

Q. But you knew about the march, is that correct?

A. I didn't know about the march until after the war, [18] sir.

Q. You knew American soldiers were in the Philippines, did you not?

Mr. Manes: I will object as being immaterial.

The Court: Overruled.

The Witness: Yes, sir.

Q. (By Mr. Dooley): Now, at the time that you entered the Japanese army, Mr. Nishikawa, you were a national of Japan, is that correct?

A. Yes. I was a national of Japan because my father registered at the time of my birth in the family register.

Q. Now, when you were in Japan in 1940, between 1940 in June and 1941 in March, is it not true

(Testimony of Mitsugi Nishikawa.)

that all Japanese of American citizenship were urged to return to the United States?

Mr. Manes: I will object to that as calling for information which the plaintiff could not have.

The Court: It might not be. That is why you have to find out. The objection is overruled.

The Witness: No, sir. I haven't heard anything about being urged to go back to the United States.

Q. (By Mr. Dooley): And what were you doing at that time, Mr. Nishikawa?

A. I was working for an aircraft company in Ota.

Q. You hadn't yet commenced your study, had you? [19]

A. I started to study under a tutor in Japanese language and in November, 1939, my father died in the United States and my financial funds was not available; so I had to find a job. And I found a job with this Nakajima Company in Ota.

Mr. Dooley: No further questions, your Honor.

Mr. Manes: I have some questions, your Honor.

Redirect Examination

By Mr. Manes:

Q. How did you get over to Japan, Mr. Nishikawa? A. By boat.

Q. Who furnished your passage?

A. My father, sir.

Q. Did he express any intention to you that he was going to assist you financially in your studies over abroad? A. Yes, sir.

Q. When you worked for this aircraft plant

(Testimony of Mitsugi Nishikawa.)

what kind of aircraft did this plant manufacture?

A. We built DC-3 fuselages, and—well, we just built the body of the planes, sir.

Q. Was this aircraft, at the time the war came on, military aircraft or for transport?

Mr. Dooley: I object to that as leading and suggestive.

The Court: Overruled.

The Witness: It was a transport, sir. [20]

Q. (By Mr. Manes): What were your wages while working for this aircraft plant?

A. 70 yen a month.

Q. How much would that be in American money?

A. $15 a month, sir.

Q. Were you able to save any money on that income? A. No, sir.

Q. Did you know, Mr. Nishikawa when you entered the army there was going to be a war between Japan and the United States?

Mr. Dooley: I object to that as leading and suggestive.

The Court: Overruled.

The Witness: No, sir, I didn't even dream of war with the United States. I didn't think Japan was foolish enough to declare war on the United States, after seeing the production of equipment in Japan. And I thought that only a crazy fool could think that Japan would win a war——

Mr. Dooley: I object and ask that the portion of the answer that is not responsive be stricken; except the "did you know" and the yes or no. I ask that be stricken, your Honor.

(Testimony of Mitsugi Nishikawa.)

The Court: Denied.

Q. (By Mr. Manes): Now, you indicated under cross-examination, Mr. Nishikawa, that you did not protest against your induction into the [21] army——. A. Yes.

Q. ——and that you did not protest against the taking of a physical examination?

A. Yes, sir.

Q. Will you state to the court why this was so?

A. I was afraid to.

Q. Why were you afraid?

A. I heard rumors—rumors were going around that Kempi Tai went to houses that tried to dodge the draft and take them up to prison; or even there was one rumor that one fellow, he hid in the warehouse and these Japanese kori, which is a straw trunk, and one Kempi Tai had an idea he was in there and with the boy's father and mother, he went into the warehouse and bayoneted these trunks and this fellow was killed.

Q. Did you believe these rumors?

A. Well, at that time the Japanese government—Japanese army was coming into control of the Japanese government and even the high officials were killed in their homes. So I had no alternative. But it might have been true.

Q. Now, when you were in the army, Mr. Nishikawa, what was your attitude toward the United States? Who did you think would win the war?

A. I always thought the United States would win it. And when I was in French Indo-China when war was declared [22] with the United States, and

(Testimony of Mitsugi Nishikawa.)

noncoms came to me and asked the question since I was born and raised in the United States and also know something about Japan, what would be the outcome of the war. And I told them there wouldn't be any chance of Japan winning the war at all. When that notification came I thought I was a dead duck then because to my mind war with the United States wasn't possible at all.

Q. Did anything happen as a result of that conversation between you and the noncommissioned officers on that particular date that you started relating?

A. That night I was called up by the enlisted personnel of higher rank and was given a thorough beating.

Q. Were any other acts of brutality committed against you after that occasion?

A. I was beaten for about almost every day for a month; and a couple days a month after I was beaten.

Q. While you were serving in the Japanese army did you have a nickname?

A. They called me "America," sir.

Mr. Manes: If the Government will permit me, I would like to refer to a document purporting to be an application for passport to Japan. I would like to have that marked plaintiff's exhibit next in order for identification.

The Clerk: Plaintiff's Exhibit No. 3 for identification. [23]

(The document referred to was marked Plaintiff's Exhibit 3 for identification.)

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PLAINTI Plaintiff's Exhibit No. 3

...l fee for a passport is $... ...ney order, and $1 for ...

...ee is $16. It is unnecessary to pay any ...e any person in connection with the filing ...ecution of this application or for obtaining ...sport. All necessary information and guidance will be given applicant by the clerk of court or Passport Agent before whom this application must be executed.

P...SSPORT APPLICATION S... FRANCISCO ...ERIES

FORM FOR NATIVE CITIZEN

[Edition of 1939]

Execute and attach PART TWO if members of family are to be included in passport

No. 2632

Dated AUG 4 - 1939

Issued by San Francisco Agency upon authority contained in Department's telegram dated AUG 4 - 1939

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UNITED STATES OF AMERICA
STATE OF CALIFORNIA } ss:
COUNTY OF LOS ANGELES

I, Mitsugi Nishikawa (Name in full) MITSUGI NISHIKAWA, a CITIZEN OF THE UNITED STATES, do hereby apply to the Department of State, at Washington, for a passport. I solemnly swear that I was born at Artesia (Town or city), (Province or county) California (State or country), on April 20, 1916 (Date)

My father, Jumpichi Nishikawa (Name), was born at Japan on Jan. 1, 1874, and is now residing at Torrance, California

I am domiciled in the United States, my **permanent residence** being at Sepulveda & Normandie (Street address) in Torrance, California (Town or city), State of California

I {~~have~~ have not} been naturalized as a citizen of a foreign State. I {~~have~~ have not} taken an oath of allegiance to a foreign State.

(If applicant took an oath of allegiance to, or was naturalized in a foreign State, a supplementary statement, under oath, should be attached)

THIS PORTION TO BE FILLED IN BY AN APPLICANT WHO WAS BORN ABROAD, OR WHOSE FATHER WAS BORN ABROAD

(See footnote at bottom of page 2)

I have resided outside the United States as follows:

(State name of, and period of residence in, each foreign country)

..... from .....

..... from ..... to .....

(Name of countries)

(The following portion in this block to be filled in only by a person whose father was not born in the United States)

My father emigrated to the United States on or about ..... (Month), 1900 (Year), resided 35 years continuously in the United States from 1900 to 1939, and was naturalized as a citizen of the United States before the ~~No~~ Court of .....

at ..... (City) ..... (State) on ..... (Month and day), 1 ..... (Year)

A WOMAN APPLICANT MUST FILL IN THIS PORTION

I was {never married. / ~~last~~ married on ..... to .....

Mitsugi Nishikawa (To be printed in full by applicant for passport)
(Surname) (First name) (Middle name)

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My last passport was obtained from None (Insert Washington, or location of office abroad) on (Date)

and is submitted herewith for cancelation (Give disposition of passport if it cannot be submitted)

I intend to visit the following countries for the purposes indicated:

Japan (Names of countries to be visited) Study & visit (Purposes of visits)

and I intend to return to the United States within 5 {months. years.

ADDRESS

I request that my passport be mailed to the following address:

[NOTE.—A passport will not be mailed to a hotel address unless the hotel is the applicant's place of permanent residence.]

PRINT

Name Mitsugi Nishikawa

Number and street Rt 1 Box 212

City and State Torrance, Calif.

DESCRIPTION AND PHOTOGRAPH OF APPLICANT

Height 5 **feet,** 7 **inches.**

Hair Black

Eyes Brown

Distinguishing marks or features None (Note any marks or scars on hands or face by which applicant may be identified)

Place of birth Artesia California (City and State)

Date of birth April 20, 1916 (Month, day, and year)

Occupation Farmer

I solemnly swear that the statements made on both sides of this application are true and that the photograph attached hereto is a likeness of me.

OATH OF ALLEGIANCE

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation, or purpose of evasion: So help me God.

Drivers License R9793o

Mitsugi Nishikawa (Signature of applicant)

Subscribed and sworn to before me this ..... day of ....., 19.....

(Testimony of Mitsugi Nishikawa.)

Q. (By Mr. Manes): Mr. Nishikawa, I am going to show you a document which purports to be a passport application purportedly executed by one "Mitsugi Nishikawa." A. Yes, sir.

Q. Is that your signature?

A. That is my signature, sir.

Q. And these questions that are asked here and answers given in here, were those your answers?

A. Yes, sir.

Q. And they were given sometime in August, 1939? A. Yes, sir.

Mr. Manes: I would like to introduce this into evidence as Plaintiff's Exhibit next in order.

Mr. Dooley: I object on the ground that the document is a statement made by the plaintiff at some future time and is self-serving and immaterial and irrelevant.

The Court: It is hearsay. Sustained.

Mr. Manes: If your Honor please, may I point out to the court that in one of the questions in this document is "I intend to visit the following countries for the purposes indicated: Japan——"

Mr. Dooley: I object to the plaintiff reading into evidence from documents that have not been admitted. [24]

The Court: He is not reading it into evidence. He is offering it into evidence.

Mr. Manes: For the purpose of "study and visit and I intend to return to the United States within 5 (months) 5 (years)." It doesn't say which here.

(Testimony of Mitsugi Nishikawa.)

Now, the point is that in 1939 when he made that statement, that shows an intention which corroborates his testimony given on the stand this morning and for that purpose we offer it. It is certainly material.

The Court: It is elementary, counsel; a self-serving statement and not admissible in evidence.

The simplest way to bring to your attention the point that is involved is if some person were going to Russia today for the purpose of delivering state secrets and in their passport said that they were going over there, that their purpose in going over there was to help the United States, but subsequently they were charged with treason, you don't think their statement that they said they were going to help the United States would be admissible, do you?

In other words, what he said is not admissible. It is hearsay, and it is self-serving. Here under oath he may testify as to his purpose in going, as he has testified. You may proceed. [25]

Mr. Manes: Thank you, your Honor.

Q. (By Mr. Manes): Mr. Nishikawa, between the time that you took the physical examination and the time that you reported for duty, did you have funds with which to return to the United States?

A. No, sir.

Q. Now, you have also mentioned on cross-examination, Mr. Nishikawa, that you were advised that the Consulate probably could not help you with

(Testimony of Mitsugi Nishikawa.)

respect to returning to the United States after you once received your notice for physical examination. Do you know whether any of those friends that discussed that with you were employed by the American Consulate?

Mr. Dooley: I object. Well, I will withdraw the objection.

The Witness: Yes, sir. One nisei friend I had mentioned the fact that the American Consulate can't do anything for a dual nationality person. He was employed by the embassy at Tokyo, sir.

Q. (By Mr. Manes): Was that an official or unofficial conversation?

A. Unofficial conversation.

Q. Is your mother now living in the United States, Mr. Nishikawa?

Mr. Dooley: I will object to that on the ground it is immaterial and irrelevant. [26]

The Court: Sustained.

Mr. Manes: I have no further questions.

Mr. Dooley: I have one or two questions, your Honor.

Recross-Examination

By Mr. Dooley:

Q. Mr. Nishikawa, at the time that you heard these rumors that you testified to did you check those rumors with any American official in Japan?

A. No, sir.

Q. Did you check those rumors with any Japanese official in Japan? A. No, sir.

(Testimony of Mitsugi Nishikawa.)

Q. Now, Mr. Nishikawa, before you entered the Japanese Army were you coerced in any way by the Japanese police?

Mr. Manes: I will object as vague and indefinite, what he means by the word "coerced."

The Court: Overruled.

The Witness: The Japanese police were checking—they were having monthly checks on my boarding house. But I never come in contact directly with the police. I tried to stay away from them.

Q. (By Mr. Dooley): I call your attention to what purports to be an application for certificate of identity and ask you if this is your signature?

A. Yes, sir. [27]

Q. And did you sign this document on the 9th day of January, 1953? A. Yes, sir.

Q. On the date it bears? A. Yes, sir.

Q. And did you——

Mr. Manes: May I see the document a moment?

Mr. Dooley: I am sorry, counsel.

Q. (By Mr. Dooley): I will read a statement on this document and ask you whether it is correct: "Though my service was involuntary there was no coercion by the Japanese police."

Is that statement correct?

Mr. Manes: I will object to the question on the ground, in the first place, there is nothing inconsistent with that statement and the testimony of the witness——

Mr. Dooley: I am just trying to verify the witness' testimony.

(Testimony of Mitsugi Nishikawa.)

Mr. Manes: Could I have a ruling, your Honor?

The Court: What is it being offered for?

Mr. Dooley: To refresh the witness' recollection and get a direct statement, perhaps.

The Court: Well, ask him if that refreshes his recollection.

Q. (By Mr. Dooley): Does that refresh your recollection, Mr. Nishikawa? [28]

A. Yes, sir. I told them at the Consulate my services were involuntary. But they said since the police didn't come and pick me up or do anything it was not through coercion and they put that statement in.

Mr. Dooley: No further questions, your Honor.

Mr. Manes: I have one question.

Redirect Examination

By Mr. Manes:

Q. Mr. Nishikawa, after the war what did you do?

Mr. Dooley: I will object to that on the grounds of immaterialty and irrelevancy.

The Court: Sustained.

Mr. Manes: No further questions, your Honor.

The Court: Mr. Nishikawa, you say that at the time you went into the Army you didn't even dream that there would be a war between Japan and this country, is that correct?

The Witness: Yes.

The Court: That was in March, 1941?

(Testimony of Mitsugi Nishikawa.)

The Witness: Yes, sir.

The Court: You are a graduate of the University of California?

The Witness: Yes, sir.

The Court: You have a degree in engineering?

The Witness: Yes, sir.

The Court: Now, you know, do you not, that at that time [29] there was what was known as a "cold" war between Japan and the United States?

The Witness: No, sir.

The Court: Do you know that at that time there was war being waged in Europe?

The Witness: Yes, sir.

The Court: And you know that there were two factions waging that war; one commonly referred to as the axis faction, Germany, Italy——

The Witness: Yes, sir.

The Court: And the allies, France and England —you knew that?

The Witness: I knew there was a war, but I didn't have any information as to the outcome.

The Court: You knew that there was a threat of war between Japan and the United States, didn't you?

The Witness: No, sir.

The Court: You were a university graduate?

The Witness: Yes, sir.

The Court: Didn't you ever read the newspapers?

The Witness: I usually read the sports page, but that's——

(Testimony of Mitsugi Nishikawa.)

The Court: You never ever read anything but the sports page, is that right?

The Witness: Well, I didn't take have much interest in politics. [30]

The Court: Or in national affairs?

The Witness: No, sir.

The Court: You didn't take any interest in national affairs, in Japanese national affairs, or you didn't take any interest in the national affairs of the United States, is that right?

The Witness: Yes, sir. Well, while I was in the United States I took interest in American national affairs; but while in Japan I didn't have any interest at all in Japanese national affairs.

The Court: And in June, 1940, when you were told that you were to be drafted into the Japanese army, between June, 1940, and March, 1941—a period of almost a year—you didn't make any effort to find out whether an American citizen—you knew you were an American citizen?

The Witness: Yes, sir.

The Court: You didn't make any effort to find out whether an American citizen was required to go into the Japanese army. And the reason that you didn't make any effort was that you heard rumors that the Kempi Tai would beat you if they found that you didn't want to go into the army: is that your testimony?

The Witness: Yes, sir. Also, this nisei friend of mine that was employed in the embassy stated

(Testimony of Mitsugi Nishikawa.)

the fact that dual citizen niseis, the American Consulate couldn't do anything [31] for the citizen nisei.

The Court: So, even though you were a United States citizen you made no effort at all to find out whether you could get out of serving in the Japanese army when you didn't want to serve in the Japanese army? They could force you to even though you didn't want to? They could force an American citizen to serve in the army?

The Witness: Yes, sir.

The Court: During the time that you got your education in this country you went to high school before you went to the university?

The Witness: Yes, sir.

The Court: And then the university. Were you taught anything about the constitution of the United States, of this country?

The Witness: Yes, sir.

The Court: Were you taught anything about the history of this country?

The Witness: Yes, sir.

The Court: The background of this country?

The Witness: Yes, sir.

The Court: And then you believed that as an American citizen that Japan could force an American citizen into the army and there wasn't anything that you could do about it, is that right? [32]

The Witness: That is right; when an employee of the embassy tells me that.

(Testimony of Mitsugi Nishikawa.)

The Court: Some friend of yours told you that?

The Witness: Yes, sir.

The Court: But you made no effort to find out officially, made no effort——

The Witness: He also mentioned the fact that if I went to them the Japanese police would find out about it and I would be in trouble later.

The Court: In other words, he told you that if you went to the officials of your own country, the United States——

The Witness: Yes.

The Court: ——that the Japanese police would find out about it and they would beat you; right?

The Witness: Yes.

The Court: So for that reason, against your will, you, as a United States citizen, permitted them to force you into the Japanese army?

The Witness: Yes, sir.

The Court: Is that what I am to believe?

The Witness: Yes, sir.

The Court: Very well. That is all. You may step down.

(Witness excused.)

The Court: Do you rest?

Mr. Manes: I would like to make argument, your Honor. [33]

The Court: You rest, though?

Mr. Manes: Yes, your Honor.

The Court: Do you rest?

(If applicant took all oath of allegiance to, or was naturalized in a foreign ...)

THIS PORTION TO BE FILLED IN BY AN APPLICANT WHO WAS BORN ABROAD, OR WHOSE FATHER WAS BORN ABROAD

(See footnote at bottom of page 2)

I have resided outside the United States as follows:

(State name of, and period of residence in, each foreign country)

....., from .....

....., from ..... to .....

(Name of countries)

(The following portion in this block to be filled in only by a person whose father was not born in the United States)

My father emigrated to the United States on or about ....., 1900, resided 35

(Month) (Year)

years continuously in the United States from 1900 to 1939, and was naturalized as a citizen of the United

States before the ..... Court of .....

at ..... on ..... 1.....

(City) (State) (Month and day) (Year)

A WOMAN APPLICANT MUST FILL IN THIS PORTION

I was { never married. / last married on ..... to .....

who was born at ..... on ....., who { is / is not } an American citizen,

and who is now residing at .....

Our marriage { has not been terminated. / was terminated by (death) (divorce) on .....

(Date of death or divorce)

My maiden name was ....., and

(Name)

I { was not previously married. / was previously married to .....

(Full name of former husband)

on ....., at ....., who was born

(Date) (City and State)

at ....., and the marriage was terminated by { death / divorce } on .....

(Date)

(If married more than twice, set forth facts in a supplemental statement)

My { husband / former husband } emigrated to the United States on .....

and { his father ..... / he } was naturalized as a citizen of the United States before the

(Name of father)

..... Court of ..... at .....

(City and State)

on ..... as shown by the Certificate of Naturalization { submitted herewith. / previously submitted.

(Month, day, and year)

I intend to leave the United States from the port of Los Angeles

(Port of departure)

on August 14, 1939, sailing on board the Kamakura Maru

(Date of departure) (Name of ship)

NOTE.—Any additional information necessary to clarify the citizenship status of applicant may be incorporated in a supplemental affidavit which will be considered a part of this application.

(OVER) 1—1477

(Full name) (Middle name)

(To be filled in by applicant for passport)

10823

RSC'd

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Eyes brn. brn.

Distinguishing marks or features None
(Note any marks or scars on hands or face

by which applicant may be identified)

Place of birth Artesia California
(City and State)

Date of birth April 2, 1916
(Month, day, and year)

Occupation Farmer

I solemnly swear that the statements made on both sides of this application are true and that the photograph attached hereto is a likeness of me.

OATH OF ALLEGIANCE

Further, I do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely, without any mental reservation, or purpose of evasion: So help me God.

Drivers License
R 91930

Matsuyo Nishikawa
(Signature of applicant)

Subscribed and sworn to before me this ..... day of ....., 19.....

[SEAL OF COURT]

Clerk of the ..... *Court at* .....

AFFIDAVIT OF IDENTIFYING WITNESS

I, the undersigned, solemnly swear that I am a citizen of the United States; that I reside at the address written below my signature hereto affixed; that I know the applicant who executes the affidavit hereinbefore set forth to be a citizen of the United States; that the statements made in the applicant's affidavit are true to the best of ~~my knowledge and belief; further~~, I solemnly swear that I have known the applicant personally for 10 years.

If witness has been issued a passport, give number if known and date or approximate date of issue.

No. ..... **Date of issue** .....

No lawyer or other person will be accepted as witness to a passport application if he has received or expects to receive a fee for his services in connection with the execution of the application or obtaining the passport.

Nida Takayama
(Signature of witness)

not related
(Relationship to applicant, if not related, so state)

Rt 1 Box 212 Torrance, Calif
(Residence address of witness)

Subscribed and sworn to before me this ..... day of ....., 19.....

[SEAL OF COURT]

Clerk of the ..... *Court at* .....

NOTE.—If applicant was born outside the United States on or after May 24, 1934, of an alien father and an American mother, a supplemental affidavit will be required giving the name and date and place of birth of mother as well as complete data concerning how and on what date she acquired American citizenship.

U. S. GOVERNMENT PRINTING OFFICE 1—1458

40

Drivers license
7/13/39 (temporary)

44

Mr. Dooley: Yes, your Honor.

The Court: All right, you may make your argument.

Mr. Manes: If the court please, the court has expressed itself on a number of occasions in dealing with situations involving American citizens who have entered and were drafted in the Japanese army. Of course, we have attempted to point out to the court—suggest to the court what we believe to be the law; that where a person is actually and physically inducted into the army that this in itself constitutes duress, sufficient duress to result in involuntary conduct.

We feel, as a matter of fact, that there is good legal authority for this proposition, and it is particularly pertinent to this case that we refer to Lehmann vs. Acheson, 206 F. 2d 592, because in that case there were facts present very similar to these. There the plaintiff registered with the Swiss Consulate or Swiss draft board when he was 18, and subsequently, or two or three years later he served in the Swiss army. Now, he did so in compliance with the law of Switzerland and because, of course, he had dual nationality.

Now, one of the factors which the court of appeals noted was that he did not protest at the time he entered the Swiss army or at the time he took the oath of allegiance. [34]

Another omission which the court had relied upon below was the fact that on his 1951 visit to the American Consulate he had failed to furnish proof

of his birth; and he did not ask for the protection of the American Consulate and expressed no desire to register as an American citizen.

Now, the court, at page 596 goes on to say that

> "With respect to these 'omissions' it need only be said that they were utterly irrelevant to the critical issue of 'voluntariness.'"

The point is aside from the facts presented in this case surrounding the plaintiff's entrance into the Japanese army. The fact is that he was drafted. And if he had not obeyed the law to submit himself to the draft he would have been punished under the laws of Japan. The courts have consistently held in these types of situations that the plaintiffs here are doing no more than they are required to do under legal duress; namely, complying with a law of the state of which they are a national.

Now, counsel for the Government in a trial memorandum, which incidentally was submitted not in compliance with Rule 12 because it did not come within the five days set out in that rule, and because of that fact we couldn't reply to it in written statement—but in any event counsel alludes to Section 802 of the Nationality Act of 1940 and attempts to—at least as I read it—he attempts to say that where [35] the plaintiff has stayed in Japan for more than six months and subsequently serves in the army of that state of which he is a national, that a presumption arises that he has expatriated himself.

Well, the fact of the matter is that this particular section has been ruled upon frequently by the courts, by no less authority than the Supreme Court in Kawakita vs. the United States, as well as by the Court of Appeals in Dos Reis vs. Nichols, 161 F. 2d. And in both of those cases, as well as in others, the court has said that it must still be shown that expatriation was voluntary or involuntary, and a showing of involuntary expatriation rebuts the Section 802 presumption. In other words, what these courts are saying is that 802 does not enlarge 401(c).

Of course, I realize that the Hamamoto case confronts us this morning. I think that Hamamoto is distinguishable. But in any event, I think that this court can well consider the factors here of a man who went to Japan earlier than Hamamoto did, in 1939, for a specific purpose, to visit and to study and who attempted to study. We know—certainly the court knows from its long experience in these cases—the circumstances surrounding, the conditions surrounding the plaintiff in Japan prior to the war. The court may take judicial notice of the fact, as a matter of fact, that much of the news which we may have known about here was not known [36] to people living in Japan in those days.

The fact remains that after his father passed away he attempted to provide for himself until such time as he could return to the United States; that he was caught up in the tentacles of war. It was not his fault. The fact that he had to stay

there and could not return to the United States is not his fault. And I would like at this time to point out that even if the plaintiff had gone to the American Consulate and had asked the American Consulate what he could do, what the Consulate could do, he couldn't return anyway because he didn't have any money. But I must suggest, however, that this is not a requirement which ought to be imposed or which is imposed upon the plaintiff, the requirement to go to the Consul.

Now, of course once he has served under the circumstances of induction, of responding to a draft notice—and there is no evidence to the contrary that he did not do so—we submit that anything that may have happened thereafter so far as the service is concerned is immaterial because he is there by obeying the military law and he is subject to punishment if he does not obey it. And this court has held on a number of occasions that we do not require of our citizens that they become martyrs in an effort to protest against their military service.

I would like, finally, to refer to several cases which [37] present analagous situations to the one here.

In Mandolla vs. Acheson, decided by the Supreme Court, we had facts where a plaintiff over 21 was conscripted in 1931 in Italy and served in the army, and at the same time took an oath of office. Now, it is true that at that time there wasn't a 41(c), but there was, however, a prohibition against taking of oath, subject of course to the penalty of expatriation. The court pointed out in that case that the

choice of taking the oath or violating the law was for a soldier in the army of fascist Italy no choice at all, and I submit that it is rather inconsistent—and incidentally I might add that the Attorney General joined the court in this particular language—and I submit that it is rather inconsistent, if not immoral, for the court now—for the attorney for the Government to now come before the court and suggest that in conduct similar to that of Mandolla's that the plaintiff has in fact expatriated himself.

But to go further, we have Lehmann vs. Acheson and Perry vs. Dulles, both of which involve cases or situations of induction into the army of respective nations of which they were a national at a time when they knew of the service of impending induction and failed to take the kind of action which the Government suggests ought to have been taken, and who yet were found to have not lost their citizenship. Why? Because they responded to the draft law of that particular [38] country.

It is significant, as a matter of fact, that the Third Circuit in the Perry vs. Dulles case says that once the plaintiff has shown that he was inducted, that he responded to a draft call, that this creates a prima facie case for conscription for legal duress and that the way the Government was then rebuffing it was by showing that he could have legally escaped.

I submit, your Honor, that on two grounds the plaintiff deserves to retain his citizenship; on the factual ground, the testimony from himself, the evidence presented to this court by the plaintiff;

and secondly by virtue of the law as this court knows and understands it.

The Court: Well, of course, the short answer to the entire argument, counsel, is that the court simply does not believe the testimony of the witness. That is all. I simply do not believe his testimony.

He went to Japan when he was 23 years of age. He remained in Japan, and the entire world was in a turmoil all the time he was in Japan. War is being waged in Europe. He is 23 years old. This isn't a case of a young boy that was taken to Japan in the early days like most of these cases, where a young boy was taken to Japan as an infant and he was reared in Japan and caught over there during the war and then was drafted into the service. Of course, there wasn't anything [39] he could do. There was no way he could leave Japan. He was drafted. He had no choice. He went into the service or he went to jail.

We don't have a situation like that. We have a young man who wasn't forced, in the first place, wasn't forced to go over to Japan, because he wasn't a child. He was 23 years old. He was a graduate from one of our greatest institutions of learning in this country with an engineering degree. And he went over there, and he knew he was registered over there in the family register, and he went over to do his duty as a Japanese national. That was the very purpose. That is why Congress enacted that legislation.

How ridiculous for me to believe his story that in the summer of 1940, when he was notified to

report, that for a year he didn't do anything to leave Japan and didn't make any effort to leave Japan. He didn't go to see the American authority. And mind you, this is a university graduate. This isn't a young fellow that is confused and lost and doesn't know his way around. This is a university graduate. And because someone told him that the Kempi Tai would beat him up if he tried to get out or if he spoke to the Americans. He just refrained from protecting his rights as a citizen. He made no effort to return to this country. If it were a plot in the wildest sort of a television story it couldn't be believed, couldn't be accredited by anyone seeking the [40] truth. The court simply does not believe that testimony. That is all there is to the case.

I believe this: He went into the service because he wanted to go into the service. I believe he went to Japan, and I believe that he waited for them to call him to the service, because under the laws of Japan that's the manner in which they took their men into the service under the draft laws, the conscription laws. That was their system of building up their armed forces. So do you think that when Congress passed this legislation that Congress had in mind that it doesn't apply to Japan, that all you need do is pass conscription laws and as long as you pass conscription laws they can go over there and wait for them to be conscripted and they don't lose their citizenship? It's ridiculous on its face.

Mr. Manes: Will your Honor permit me just two brief remarks?

The Court: Yes, sir.

Mr. Manes: Your Honor, in the first place this plaintiff went to Japan in 1939. The Nationality Act of 1940 was not passed until 1940 and did not become effective until January 23, 1941. So of course he did not have before him the law until 1941.

The Court: I am not talking about his being familiar with the law. All I am saying is that is why Congress passed [41] the law, because he and others like him went over to Japan to serve in the Japanese army; because he received his education in the public schools of this country and in the University of California, and then went over to serve in the Japanese army. Now, that is why Congress adopted those provisions of the law.

Now, I am not saying that he knew that or he knew that Congress would adopt those provisions of the law. I am not even saying that he knew when he went into the army that he would have lost his citizenship. All I am saying is that he went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army. He went over there to serve his hitch in the army. He went over and he waited until they reached him on the draft, and when they did he was drafted. And that is what he was there for. And his service could not be considered involuntary. Reference has been made to 1940, and when he was notified in 1940 did he get out? Because then he was notified to report. And for a year between 1940 and 1941 he made no effort to get out. He made no effort to leave the country. We just happen

to say 1940 because that is the time he said he was notified. But it isn't necessary to say 1940. The fact is that he, a university graduate, a man with that education, he must have known even before they told him, he must have known that they have armies and he must have known [42] that they conscript men in those armies. He must have known, and he testifies that he knew, that he was registered in the family register over there. He knew, and he has testified he knew, he had dual nationality. He knew he was going to be drafted. So even before they notified him it was his turn he knew and he was waiting for it. He waited for it for the time he was there. He was waiting for that draft, for that call to serve. He made no effort to leave there.

If you were in a foreign country and you were notified that you were going to be drafted and you did nothing about leaving the foreign country, did nothing about contacting the American officials, and then you said to me, "I was afraid to"; don't you think that I would be justified in thinking you were a little stupid or something was wrong with you, that you needed a little mental attention?

Mr. Manes: If your Honor please, I don't think that that would be the situation where I knew that the circumstances in the particular country of which I was a national were such that a protest would have been futile or might have been dangerous. And, of course, that has been the situation in Japan.

The Court: Well, in other words, you mean that you, being a citizen of the United States, you would be afraid?

Mr. Manes: I might be. It is conceivable that I might be afraid. [43]

The Court: In other words, you would go and serve in that army of that foreign nation because you were afraid you would be beat up if you spoke to the officials of your own country?

Mr. Manes: I might. I don't know.

The Court: The judgment will be for the defendant.

Mr. Dooley: Thank you, your Honor.

Mr. Manes: If your Honor please, could I have a ruling, also, on the constitutionality of this Act, Provision 401(c)? I would like to raise the argument before the court now that it is unconstitutional——

The Court: You have a ruling here. I have found for the defendant, which of course necessarily follows that you have a ruling on it.

Mr. Manes: I thought I would raise it to the court for a specific ruling.

The Court: That is right. You have a ruling on it, in accordance with the finding for the defendant, that the law is constitutional.

Mr. Manes: Thank you, your Honor.

(Whereupon at 11:45 o'clock a.m. the above-entitled matter was concluded.) [44]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the

United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 22nd day of April, 1955.

/s/ DON P. CRAM,
Official Reporter.

[Endorsed]: Filed April 21, 1955.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 21, inclusive, contain the original:

Complaint:
Answer to Plaintiff's Complaint;
Order on Stipulation for Substitution of John Foster Dulles, as Secretary of State, as party defendant;
Findings of Fact and Conclusions of Law;
Judgment;
Notice of Appeal;
Designation of Contents of Record on Appeal;

and a full, true and correct copy of the Minutes of the Court on Dec. 23, 1954; which, together with the original plaintiff's exhibits 1, 2, and 3; and one volume of Reporter's Transcript of Proceedings had on Dec. 23, 1954, in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in said cause.

I further certify that my fees for preparing and certifying the foregoing record amount to $2.00, which sum has been paid by appellant.

Witness my hand and the seal of said District Court, this 25th day of April, 1955.

[Seal] EDMUND L. SMITH,
Clerk;

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14742. United States Court of Appeals for the Ninth Circuit. Mitsugi Nishikawa, Appellant, vs. John Foster Dulles, as Secretary of State, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed April 26, 1955.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14742

MITSUGI NISHIKAWA,

Plaintiff and Appellant,

vs.

JOHN FOSTER DULLES, as Secretary of State,

Defendant and Appellee.

AMENDED STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Pursuant to Rule 17(6) of this Court, appellant files the following as his statement of points on appeal:

1. The trial court erred in giving judgment for the defendant;

2. The trial court erred in failing to adjudge that plaintiff is a national of the United States and that he did not lose that nationality by reason of his having served in the Japanese Army;

3. The trial court's findings number III, VII, and VIII are not supported by the evidence;

4. The trial court erred in its conclusion number III;

5. The trial court erred in ruling that 8 USC 401(e) is constitutional.

6. The trial court erred in refusing to admit into evidence plaintiff's exhibit 3, for identification.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,

Attorneys for Plaintiff and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 20, 1955.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF THE RECORD WHICH IS MATERIAL TO THE CONSIDERATION OF THE APPEAL

Pursuant to Rule 17(6) of this Court, appellant hereby designates as the record which is material to the consideration of the appeal, the entire Clerk's transcript and Reporter's transcript as certified to this Court, including exhibits 1, 2, and 3.

WIRIN, RISSMAN & OKRAND,

By /s/ FRED OKRAND,

Attorneys for Plaintiff and Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 20, 1955.

[fol. 64] Argument and Submission—May 21, 1956 (omitted in printing)

[fol. 65] In United States Court of Appeals for the Ninth Circuit

Minute Entry of Order Directing Filing of Opinion and Filing and Recording of Judgment—June 18, 1956

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion rendered.

[fol. 66] In United States Court of Appeals for the Ninth Circuit

No. 14,742

Mitsugi Nishikawa, Appellant

vs.

John Foster Dulles, as Secretary of State, Appellee

Appeal from the United States District Court
for the Southern District of California
Central Division

Opinion—June 18, 1956

Before: Chambers, Circuit Judge, and Solomon and Hamlin, District Judges

Hamlin, District Judge:

This is an appeal from a judgment of the District Court decreeing that the appellant Nishikawa, who was born in the United States, lost his United States citizenship by entering and serving in the Armed Forces of Japan from March 1, 1941 to September 6, 1945, and denying appel-

lant's prayer for judgment that he is a national of the United States.

The action was begun when Nishikawa filed a complaint for a judgment declaring that he was a national of the United States under §503 of the Nationality Act of 1940, 8 U.S.C.A. §903, 1946 Ed.[1] The complaint alleged that he was born in the United States on April 20, 1916 and that on August 15, 1939 he went to Japan for the purpose of education and experience in the engineering field and that his intention was to return to the United States. The com- [fol. 67] plaint further alleged that on or about March 1, 1941, plaintiff was conscripted into the Japanese army and served in that army until August, 1945, and that his service in said army was due to the Japanese conscription law and was the result of coercion, and was not the plaintiff's free and voluntary act. The defendant answered and admitted that the plaintiff had served in the Japanese army during the above dates at a time when the plaintiff was a national of Japan, and denied that such service was not a free and voluntary act of the plaintiff, denied that it was the result of coercion, and denied that it was due to the Japanese conscription law. The answer specifically alleged that such service was the free and voluntary act of the plaintiff.

On the trial of the matter, the plaintiff was called as the first and only witness. He testified, in substance, as follows: Until he went to Japan in 1939 he had resided and gone to school in the United States, graduating from the University of California with a degree in engineering. His parents then resided in the United States and his father had registered him in the family register in Japan when he was born. He stated he intended to stay two to five years in Japan to visit and to study. When he went to Japan he knew that Japan was fighting in Manchuria. In Japan he started to study under a tutor in Japanese language. His father died in November, 1939, and funds were not available and he found a job in an aircraft plant in Ota. About June of 1940 he received a notice to report for his

[1] This section was repealed by the Immigration and Nationality Act of 1952, and is now covered by 8 U.S.C.A. §1503.

physical examination pursuant to army service and he was inducted into the Japanese army in March, 1941. Between those dates he did not contact or attempt to contact any American or Japanese official, nor did he at any time protest his induction. At no time did he tell any Japanese or American official that he was a United States citizen. He had heard rumors that the Kempi Tai (Secret Police) beat up persons who attempted to avoid conscription, and a friend of his who worked at the American embassy told him that the consulate could do nothing for dual nationals, such as he was. When asked if he believed the rumors about the Kempi Tai, he stated:

> "Well, at that time the Japanese government Japanese army was coming into control of the Japanese government and even the high officials were killed in their homes. So I had no alternative. *But it might have been true.*" [Emphasis added.]

[fol. 68] He testified that he knew nothing about the conscription of men in the army in the United States in September, 1940, or of conditions in the United States, and that he was not told of these matters in letters from home and they were not discussed among his United States citizen friends in Japan.

He testified, in part, as follows:

> "Q. Now, you stated, did you not, Mr. Nishikawa, that in 1940 you received a notice to report for physical examination, is that correct?
>
> A. Yes, sir.
>
> * * * * * * *
>
> Q. Do you recall the approximate date?
>
> A. It was around June, 1940.
>
> Q. June of 1940. And you entered the Japanese army in March of 1941, is that correct?
>
> A. Yes, sir.
>
> Q. Now, between June of 1940, and March of 1941, did you go to the American Consulate and tell them that you did not want to serve in the Japanese army?
>
> * * * * * * *

The Witness: No, sir, because I talked to friends of mine and they mentioned the fact that the American Consulate couldn't do anything for dual citizenship of Japanese while in Japan.

Q. By (Mr. Dooley): Between June of 1940 and March of 1941, did you tell any Japanese official that you were an American citizen?

. . . . . .

The Witness: No, sir.

Q. (By Mr. Dooley): Between June of 1940 and March of 1941, did you make any effort to renounce your Japanese nationality?

. . . . . .

The Witness: No, sir.

. . . . . .

Q. Did you read the newspapers between September 16th, 1940, and March of 1941?

A. No, sir.

Q. You didn't read any newspapers?

A. No, sir.

[fol. 69] Q. Now, how far did you go in school before you went to Japan in 1939, Mr. Nishikawa?

A. I graduated from the University of California at Berkeley, sir.

Q. And you took up engineering, did you not?

A. Yes, sir.

. . . . . .

Q. Now, when you received your notice to report to the Japanese army did you protest in any way your entrance in the Japanese army?

. . . . . .

The Witness: No, I didn't.

Tr. pp. 26-30

* * * * * * *

Q. (By Mr. Manes): Now, you indicated under cross-examination, Mr. Nishikawa, that you did not protest against your induction into the army—

A. Yes.

Q. —and that you did not protest against the taking of a physical examination?

A. Yes, sir.

Tr. p. 37.

* * * * * * *

The Court: And in June, 1940, when you were told that you were to be drafted into the Japanese army, between June, 1940, and March, 1941—a period of almost a year—you didn't make any effort to find out whether an American citizen—you knew you were an American citizen?

The Witness: Yes, sir.

The Court: You didn't make any effort to find out whether an American citizen was required to go into the Japanese army. And the reason that you didn't make any effort was that you heard rumors that the Kempi Tai would beat you if they found that you didn't want to go into the army; is that your testimony?

The Witness: Yes, sir. Also, this nisei friend of mine that was employed in the embassy stated the fact that dual citizen niseis, the American Consulate couldn't do anything for the citizen nisei.

Tr. p. 47.

* * * * * * *

[fol. 70] The Court: In other words, he told you that if you went to the officials of your own country, the United States—

The Witness: Yes.

The Court: —that the Japanese police would find out about it and they would beat you; right?

The Witness: Yes.

Tr. p. 49.

* * * * * * *

After argument by counsel, the Court made the following statements:

"Well, of course, the short answer to the entire argument, counsel, is that the Court simply does not believe the testimony of the witness. That is all. I simply do not believe his testimony." Tr. p. 55.

* * * * * * *

"I believe this: he went into the service because he wanted to go into the service. I believe he went to Japan, and I believe that he waited for them to call him to the service, because under the laws of Japan that's the manner in which they took their men into the service under the draft laws, the conscription laws." Tr. p. 56.

* * * * * * *

"* * * All I am saying is that he went over because as a Japanese citizen under the laws of Japan it was necessary for him to serve his hitch in the army. He went over there to serve his hitch in the army. He went over and waited until they reached him on the draft, and when they did he was drafted. And that is what he was there for. And his service could not be considered involuntary." Tr. p. 57.

The Court entered Findings of Fact in which the Court found that plaintiff went to Japan in August, 1939 at twenty-three years of age, knowing at that time that he was likely to be called for military service in the Japanese Armed Forces; that he served in those armed forces from March, 1941 to September, 1945 while he was a national of Japan; that from the time he received his notice to report for physical examination in June, 1940 until March, 1941 when he was inducted, the plaintiff made no effort (1) to

return to the United States; (2) to avoid entry or service in [fol. 71] the Japanese Armed Forces; (3) to renounce his Japanese nationality; (4) to communicate or attempt to communicate, either with American officials in Japan, or with Japanese officials, with respect to the necessity or propriety of his entry and service in the Japanese Armed Forces. The Court further found that the service was not the result of coercion, and that it was the free and voluntary act of the plaintiff. On these Findings, he entered the Judgment from which this appeal is taken.

Appellant contends that some of the findings made by the lower court must be set aside, because (1) there is no positive evidence in the record to support them and they were expressly negatived by the plaintiff on the stand; (2) the proof of expatriation must be "clear, unequivocal and convincing"; (3) the burden of proof of the voluntary nature of the expatriating act is on the one trying to show expatriation (here, the defendant) and the burden of proof is not on the plaintiff to show involuntariness.

Counsel for both parties agree that the act of expatriation must be a voluntary act on the part of the plaintiff in order to effect an expatriation. However, there is no requirement that he knew or intended that his act would result in an expatriation. *Savorgnan v. United States*, 338 U.S. 491 (1950). The ground of expatriation relied on by the defendant in the present case is that contained in § 401(e) of the Nationality Act of 1940, 8 U.S.C.A. § 801(e), 1946 Ed. That section reads as follows:

> "A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * (e) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state."

That section is fortified by the presumption appearing in § 402 of the same Act, 8 U.S.C.A. 802,[2] 1946 Ed., which reads in part as follows:

> "A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection (c) or (d) of Section [fol. 72] 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state * * * and such presumption shall exist until overcome whether or not the individual has returned to the United States. * * * "

The crucial issue in this case is whether the entry of the plaintiff into the armed forces of Japan was a voluntary act on his part. In 1940 when this statute was enacted by Congress it was well known that many countries had conscription laws. If Congress had intended to exclude the act of a dual national who entered the military service of a foreign country by means of the conscription laws from the expatriation provisions of the Act, it would have been very simple to so provide. The plaintiff contends that the burden of proof of voluntariness was on the defendant, while the defendant contends that the burden of proof was on the plaintiff to show involuntariness. The issue was expressly resolved in the case of *Pandolfo v. Acheson*, 2 Cir., 202 F. 2d 38, and the ruling there was followed by the Court of Appeals for the District of Columbia, in *Alata v. Dulles*, 221 F. 2d 52, and appears to us to be the correct rule. In *Alata v. Dulles*, *supra*, at page 54, it is said:

> "The Secretary of State answers that since the evidence supports the finding that he took the expatriating oath the burden of offsetting its effect by showing it to have been involuntary was cast upon him and he failed to carry this burden.
>
> We agree with the Secretary's position as to where the burden lay. As held in *Pandolfo v. Acheson*, 2 Cir., 202 F. 2d 38, 40,

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[2] Sections 802 and 801(c) were repealed by the Immigration and Nationality Act of 1952 and are now covered by 8 U.S.C.A. §§ 1482 and 1481(a)(3) respectively.

> " * * The plaintiff has the burden of proving that he is a United States citizen. He made a *prima facie* case by alleging and proving his birth in New York. The Government then had the burden of showing that he had expatriated himself. This it did by proof of his oath of allegiance to the King of Italy. Presumptively this oath was voluntarily taken. He then had the burden of going forward with evidence to establish that it was taken under duress.' "

[fol. 73] This rule if applied here would cast the burden upon the plaintiff to show that his entry into the armed forces was involuntary. There is no presumption that one who is conscripted into the armed forces enters involuntarily, and all the circumstances must be looked at to resolve the question of voluntariness. *Acheson v. Maenza*, D. C. Cir., 202 F. 2d 453, 459; *Alata v. Dulles*, *supra*; see 15 A. L. R. 2d 550, and 1956 Supp. In *Alata v. Dulles*, *supra*, at page 55, the Court said:

> "We pointed out in *Acheson v. Maenza*, *supra*, that induction into an army under a conscription law is alone insufficient to establish involuntariness of service under the Nationality Act of 1940 * * *. But we also said, 'there must be consideration of the circumstances attending the service in the foreign army, and the reasonable inferences to be drawn therefrom * * * ' ".

The trier of fact need not accept the uncontradicted testimony of a witness who appears before it, and the demeanor of that witness may be such as to convince the trier that the truth lies directly opposed to the statements of the witness. *NLRB v. Howell Chevrolet Co.*, 9 Cir., 204 F. 2d 79, 86; *aff'd sub. nom. Howell Chevrolet Co. v. NLRB*, 346 U. S. 482; *Chow Sing v. Brownell*, 9 Cir., 217 F. 2d 140, 143; *Lew Wah Fook v. Brownell*, 9 Cir., 218 F. 2d 924; *Mar Gong v. Brownell*, 9 Cir., 209 F. 2d 448, 449, 450; Wigmore on Evidence, Third Ed., Vol. VII, § 2034 n. 3; *Zimmer v. Acheson*, 10 Cir., 191 F. 2d 209, 212. This rule is particularly true where the witness is interested in the outcome of the case, or where his testimony is improbable or contains patent omissions and inconsistencies. *Quock Ting v. United States*, 140 U. S. 417, 420; *Zimmer v. Acheson*, *supra*. We

think that the testimony of the plaintiff in the present case, as revealed in the record and summarized and set out above in part, clearly brings it within this rule, and entitled the Court to find that the facts were otherwise than stated by the plaintiff, and by clear and convincing proof, if need be. Under no circumstances can it be said that they are "clearly erroneous", within the meaning of Rule 52(a) of the Rules of Civil Procedure, and hence they cannot be set aside by this Court.

The Court was not required to believe that appellant was himself the victim of terror conditions in Japan. In dis- [fol. 74] cussing a similar contention in this Court in *Coumas v. Brownell*, 9 Cir., 222 F. 2d 331, 1955, Chief Judge Denman said:

> "Coumas first contends that since expatriation must be caused by his 'voluntary' act, *Perkins v. Elg*, 307 U. S. 325, 334, 50 S. Ct. 884, 83 L. Ed. 1320, his entry into the Greek army was involuntary because he was *inducted* into it. It nowhere appears that he protested his induction, and he voluntarily went to Greece presumably knowing that under the Greek law he, a Greek citizen, might be conscripted into the army. Cf. *Dos Reis ex rel. Camara v. Nicolls*, 1 Cir., 161 F. 2d 860."

This language is particularly descriptive of the facts in the instant case.

Neither the facts found by the District Court nor the inferences from those facts can be set aside by this Court unless "clearly erroneous." The record here amply supports the conclusion of the lower court that the act of the plaintiff in entering the Japanese army was a voluntary act.

Appellant further complains of the refusal of the lower court to admit in evidence the passport application of appellant. There appears to be no error in this ruling. In any event the appellant testified upon the trial to all of the important facts which appeared in the passport application.

It is further contended that the recent decision in *Gonzales v. Landon*, 350 U. S. 920, means that this case should be reversed, inasmuch as the Court there said that proof of expatriation must be by "clear and convincing" evidence, and that this was not done here. We do not agree. First,

the *Gonzales* case only dealt with §401(j) of the 1940 Act which provides that a person expatriates himself when he remains out of the country "for the purpose of avoiding service in the armed forces of the United States." This ground of expatriation, unlike the one in issue here, requires a mental element in the expatriating act itself. This is all the more clear by the fact that the cases cited by the Supreme Court for its authority dealt also with conduct requiring a certain mental element. *Baumgartner v. U. S.*, 322 U. S. 665, 1943; *Schneiderman v. U. S.*, 320 U. S. 118, 1942. Secondly, the fact that appellant here performed [fol. 75] the act that is proscribed by §401(c), to-wit, entering and serving in the armed forces of Japan, was established by clear and convincing evidence,—in fact, it was pleaded by plaintiff in his complaint and admitted in the answer.

Appellant further contends that §401(c) of the 1940 Act which is here under consideration, is unconstitutional. This Court has already held other sections of the same Act providing for expatriation to be constitutional. As to §401(j), *Vidales* v. *Brownell*, 9 Cir., 217 F.2d 136, 138; *Gonzales* v. *Landon*, 9 Cir., 215 F.2d 955, rev'd on other grounds, 350 U.S. 920; as to §401(c), *Miranda* v. *Clark*, 9 Cir., 180 F.2d 257. There is nothing in these previous holdings of this Court to indicate that the same result should not be reached as to §401(c). Moreover, the many cases from other circuits, cited above, which have considered expatriation under §401(c) have assumed that it is constitutional. Appellant asserts that all persons born in the United States are citizens by virtue of the Constitution and that Congress is powerless to enact laws which will deprive a native born American of his citizenship absent a voluntary renunciation by such person. That Congress has such power was established in *Mackenzie* v. *Hare*, 239 U.S. 299. In our view, the claim of unconstitutionality lacks merit.

The judgment of the District Court is affirmed.

[File endorsement omitted.]

[fol. 76] IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 14742

MITSUGI NISHIKAWA, Appellant

vs.

JOHN FOSTER DULLES, as Secretary of State, Appellee

JUDGMENT—Filed and entered June 18, 1956

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On consideration whereof it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed.

[File endorsement omitted.]

[fol. 77] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 78] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1956

No. 415

[Title omitted]

ORDER ALLOWING CERTIORARI. Filed November 13, 1956

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 318 Misc.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(3103-9)